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In The

Supreme Court of the United States

October Term, 1979

No. 79-594

GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services,

Petitioner,

vs.

GAYLE McQUOID HOLLEY, individually and on behalf of JAMES McQUOID, NORMAN McQUOID, THOMAS McQUOID, DOUGLAS McQUOID, MICHAEL McQUOID, and ADELAINE McQUOID, her minor children,

Respondents,

and

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MILO I. TOMANOVICH
Chief Social Services Counsel
Monroe County Department of
Social Services
Attorney for Petitioner
111 Westfall Road
Rochester, New York 14620
Telephone: (716) 442-4000

James A. Robinson
Social Services Counsel
of Counsel

Daily Record Corporation
Rochester, New York
(5287)
Spaulding Law Printing
Syracuse, New York

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No.

GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services,

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vs.

GAYLE McQUOID HOLLEY, individually and on behalf of JAMES McQUOID, NORMAN McQUOID, THOMAS McQUOID, DOUGLAS McQUOID, MICHAEL McQUOID, and ADELAINE McQUOID, her minor children,

Respondents,

and

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Russo* respectfully prays that a *writ of certiorari* be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in cause numbers 79-

*The action had originally been commenced against Abe Lavine, then State Commissioner of Social Services and James Reed, Commissioner of Monroe County Department of Social Services. Abe Lavine has been succeeded in office and function by Philip Toia, Carmen Shang, and now, Barbara Blum, while James Reed has been succeeded in office by Gabriel T. Russo (Rule 48 [43]).

7182, 79-7190 and 79-7202 on July 13, 1979, affirming the judgment of the United States District Court for the Western District of New York.

OPINIONS BELOW

The decision and order of the District Court (JOHN T. CURTIN, D.J.) dated February 1, 1979 has been reported at 464 F. Supp. 718. It is appended here as Appendix A.

The opinion of the Court of Appeals for affirmance was dated July 13, 1979 and is not reported as yet. It is set forth as Appendix B to this Petition.

JURISDICTION

Judgment in the Court of Appeals was entered on July 13, 1979 (Appendix C). Application for a stay of said Judgment pending review on certiorari has been made but has not yet been granted or denied.

The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether for purposes of Eleventh Amendment immunity the Monroe County Department of Social Services is an arm of the State in its role as local administrator of the state plan for aid and services to needy families with children (AFDC).

2. Should not the defendant, Monroe County Department of Social Services, acting in good faith and in accordance with the statutes and social services regulations promulgated thereunder then existing in New York State, enjoy a qualified immunity from the retroactive award of damages.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following constitutional provisions, statutes and regulations are involved in this case.

Provision of the Constitution of the United States Involved.

Amendment XI

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Provision of the New York Constitution Involved.

Article XVII, Section 1

> "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."

Federal Statutes Involved.

42 U.S.C. §602(a)(1)(2)(3)	— Appendix D
42 U.S.C. §1983	— Appendix E

Federal Regulations Involved.

45 CFR 205.100(a)(1)(i) 45 CFR 205.100(b)(1)(3)	— Appendix F
45 CFR 205.120(a)	— Appendix G

New York Statutes Involved.

Social Services Law §17(a)	Appendix H
Social Services Law §20(2)	Appendix I
Social Services Law §34(1)(2)(3a-f)	Appendix J
Social Services Law §65(1-3)	Appendix K

Statement of the Case

Petitioner, Monroe County Department of Social Services, denied Respondent Holley public assistance benefits under New York's program of Aid to Families with Dependent Children on the basis of Social Services Law §131-k. This decision was affirmed by New York State Department of Social Services by a Fair Hearing decision.

The State statute and the actions of New York State Department of Social Services and Monroe County Department of Social Services were, after prolonged litigation, found to conflict with regulations of the Secretary of Health, Education and Welfare, 45 CFR §233.50, *Holley* v. *Lavine*, 553 F2d 845 (2nd Circ. 1977), cert den 435 US 947. The matter was remanded to the District Court to consider the appropriate form of injunction and issues of damages and attorney's fees.

On remand, the District Court found the Monroe County Department of Social Services liable for damages in the amount of public assistance wrongfully withheld but found New York State Department of Social Services to be immune from liability under the Eleventh Amendment, U.S. Constitution for said damages. *Holley* v. *Lavine*, 464 F. Supp. 718 (WDNY 1979).

The United States Court of Appeals, Second Circuit, affirmed the judgment, *Holley* v. *Lavine*, — F2d —, Nos. 79-7182, 79-7190, 79-7207, decided July 13, 1979, holding in part, that the County defendant should not be considered an "arm of the state" for Eleventh Amendment immunity purposes.

The Court further held that there can be no good faith defense to a claim for AFDC benefits that have been found to be due and owing.

Facts Material to Consideration of the Questions Presented

New York State has elected to participate in the federally funded AFDC public assistance program.

As required under 42 U.S.C. §602(a)(1)(3), New York State Department of Social Services has been designated as the single agency for supervision and administration of the State plan, which plan is mandatory upon all political subdivisions of the State.

There has been no dispute that the Monroe County Department of Social Services is an "arm of the state" for purpose of administering federal welfare programs (Appendix A, page A-10).

Application for assistance herein was made pursuant to New York's plan for aid to needy families with children.

REASONS FOR ALLOWANCE OF THE WRIT

I

The Monroe County Department of Social Services Should be Considered an Arm of the New York State Department of Social Services for Eleventh Amendment Purposes.

As is stated by the Second Circuit in the decision below, "this case raises difficult issues of application of the Eleventh Amendment in suits involving welfare benefits". *Holley* v. *Lavine*, — F2d — (Appendix B, Page A-17).

In addressing itself to the arguments of the County and State defendants on appeal respecting Eleventh Amendment immunity, the Court, in denying "arm of the state" status for Eleventh Amendment purposes, stated, "These are substantial arguments and one does not speak with confidence in this complex and difficult area" (Appendix B, Page A-23).

A definitive answer is of paramount importance to local welfare agencies in New York State, as well as other local agencies whose states have elected to participate in federal aid to families with dependent children.

The New York Court of Appeals has decided that under State and Federal Law the local commissioner is an agent for the State department and is the local arm of the single State administrative agency and cannot seek judicial review of fair hearing decisions of the states. *Beaudoin* v. *Toia*, 45 NY 2d 343, (1978). See also *Swift* v. *Toia*, 450 F.Supp. 983 (SDNY, 1978) affirmed 598 F2d, 312 (2nd Circ., 1979).

The County defendant is thus left with the conundrum of being unable to challenge determinations made by the State while being left unprotected from civil liability if the unchallengeable determinations are held to be violative of the constitution or

federal statutes or regulations, while the State remains immune and protected by the Eleventh Amendment.

This Court has not ruled upon this issue.*

Prior decisions of this Court in *Edelman* v. *Jordan*, 415 US 651, (1974), *Monell* v. *New York City Department of Social Services*, 436 US 658 (1978) and *Mt. Healthy City Board of Education* v. *Doyle*, 429 US 274 (1977), leave the question of County liability under these circumstances unanswered.

In the *Mt. Healthy* decision this Court seems to indicate that the primary factors in determining whether Eleventh Amendment immunity protection will be extended to municipal corporations or other political subdivisions are 1) the nature of the entity created by state law and 2) the extent to which the local agency is financially independent of the state.

The Second Circuit's answer to the first factor clearly seems to contravene *Beaudoin*, supra, and in particular the Court of Appeals interpretation of the nature of the local welfare entity created pursuant to Article 17, Section 1 of the New York Constitution, and Social Services Laws, Sections 17, 20, 34 and 65. *Beaudoin*, *supra* at 347.

In rejecting the arguments of defendants below, both Courts rely heavily on the opinion in *Toia* v. *Regan*, 54 AD 2d 46 (4th Dept. 1976), aff'd 40 NY 2d 837 (1976) as standing for the proposition that the County bears the ultimate responsibility for furnishing public assistance.

This line of reasoning appears to ignore the principle set forth by the New York Court of Appeals, beginning with *Tucker* v. *Toia*, 43 NY 2d 1, (1977) stating that New York Constitution, Article 17, Section 1, imposes the duty on the State to aid the

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*It should be noted that the Second Circuit indicated that the case of *Mackey* v. *Stanton*, 586 F2d 1126 (7th Circ. 1978), petition for cert filed (No. 78-1733), is inconclusive respecting the issue herein presented.

needy. See also *Bernstein* v. *Toia*, 43, NY 2d 437, (1978), *Lee* v. *Smith*, 43 NY 2d 453 (1978) (all decisions being subsequent to *Toia* v. *Regan*, supra).

The State, however, has recognized its responsibility and has opted to minimize costs to the State. In so doing, it has totally preempted local authority or discretion, as prescribed by federal law and regulations, in order to obtain federal reimbursement. See 42 U.S.C. §602(a)(1)(2)(3) which requires that the state plan shall be in effect in all political subdivisions, be mandatory upon them, and be administered by a single state agency, (Appendix D). See also 45 CFR 205.100(a)(1)(i) and 45 CFR 205.100(b)(1)(3), (Appendix F) and 45 CFR 205.120(a), (Appendix G).

As a result, local administrative welfare units are totally dependent upon the State and its plan, respecting fiscal aspects of implementation of public assistance for AFDC applicants.

The Second Circuit therefore was in error in concluding that the County defendant should not be treated as an "arm of the state" for Eleventh Amendment purposes.

II

The County of Monroe Department of Social Services Should Have a Qualified Immunity from the Award of Damages Based Upon a Good Faith Reliance Defense.

The U.S. Supreme Court in *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978) did hold that local governments are no longer "wholly immune from suit under §1983." It did not, however, confer absolute liability upon local government, and did not address "what the full contours of municipal liability under §1983 may be." 436 U.S. at 695.

Courts faced with the issue since *Monell* have afforded a qualified good faith immunity to municipalities based upon criteria previously set forth in *Wood* v. *Strickland*, 420 US 308,

(1975), and *Scheuer* v. *Rhodes*, 416 US 232 (1973). See *Owen* v. *City of Independence*, 589 F2d 335, (8th Circ. 1978). *Sala* v. *County of Suffolk*, — F2d —, (2nd Circuit Docket No. 79-7009, decided August 17, 1979) *Ohland* v. *City of Montpelior*, 467 F. Supp. 324 (USDC-Vermont, 1979).

In the instant case, the local commissioner had no discretion in following the mandate of Social Services Law 131-k as interpreted by the New York State Department of Social Services, 18 NYCRR §349.3

Said statute was not declared invalid for several years and then only through the appeal process. The local Commissioner had no reason to believe said statute would be declared invalid, and thus certainly acted in good faith. There are no allegations of malice on his part.

The burden should thus not be thrust upon a local Commissioner, administering a state assistance program pursuant to state statutes and regulations to either abide by the statute and face the possibility of retroactive liability, or in the alternative, refuse to comply with the statute and thereby lose state, and possibly federal, reimbursement, in so doing.

Failure to afford the local commissioner qualified immunity under these circumstances would certainly deter him from performing his essential government function. *Butz* v. *Economu*, 438 US 478 (1978).

CONCLUSION

For the foregoing reasons, the Petitioner prays that this Court issue a writ of certiorari, to the United States Court of Appeals for the Second Circuit to review its decision in this cause and grant all other just and proper relief.

Dated: October 9, 1979.

Respectfully submitted,

MILO I. TOMANOVICH
Chief Social Services Counsel
Monroe County Department of
Social Services.
Attorney for Petitioner

James A. Robinson
Social Services Counsel
Of Counsel

Appendices

APPENDIX A

(Decision and Order of the District Court)

Entered in the Office of the Clerk of the United States District Court for the Western District of New York, February 1, 1979.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GAYLE McQUOID HOLLEY, Individually and on behalf of JAMES McQUOID, NORMAN McQUOID, THOMAS McQUOID, DOUGLAS McQUOID, MICHAEL McQUOID, and ADELAINE McQUOID, her minor children.

Plaintiff,

vs.

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Defendants.

Civ-75-151

APPEARANCES:

K. WADE EATON, ESQ., Greater Upstate Law Project, Monroe County Legal Assistance Corporation, Rochester, New York, for Plaintiff.

ROBERT ABRAMS, ESQ., Attorney General of the State of New York (ALAN W. RUBENSTEIN, ESQ., of Counsel), Albany, New York, for Defendant State Commissioner.

CHARLES G. FINCH, ESQ., Chief Counsel (CHARLES G. PORRECA, ESQ., of Counsel), Rochester, New York, for

Defendant Commissioner of Monroe County Department of Social Services.

This case is before the court on remand from the Second Circuit to determine appropriate declaratory, injunctive and monetary relief. The plaintiff, a Canadian citizen, first entered the United States as a non-immigrant student. She subsequently gave birth to six children in this country. Sometime prior to August 1974, the plaintiff began receiving a grant of Aid to Families with Dependent Children [A.F.D.C.] for herself and her six children. In August 1974, the grant to plaintiff's household was reduced by one-seventh because a new state law and corresponding regulation rendered the plaintiff, an illegal alien, ineligible for assistance. N.Y. Soc. Serv. L. §131-K; 18 N.Y.C.R.R. §349.3. This determination was upheld by the Commissioner of the New York State Social Services Department on December 19, 1974 after an administrative fair hearing. The reduction was effective on January 15, 1975.

On April 17, 1975, the plaintiff, suing individually and on behalf of her six minor children, filed a complaint in federal district court against Abe Lavine, the Commissioner of the New York State Department of Social Services (the state defendant), and James Reed, the Commissioner of the Monroe County Department of Social Services (the county defendant), respectively. The complaint, alleging jurisdiction under 28 U.S.C. §§1343 and 1331, and 42 U.S.C. §1983, claimed that §131-K was inconsistent with the Social Security Act and federal regulations and deprived the plaintiff of due process and equal protection in violation of the fourteenth amendment. Plaintiff sought declaratory relief, an injunction, and damages for the amount of benefits denied her household as a result of the operation of the state statute. She also requested a preliminary injunction requiring defendant Reed to restore her household's benefit level to its prior level pending final disposition of this action.

Motions to dismiss were submitted by both defendants, and on July 30, 1975, Judge Burke dismissed this action "for lack of jurisdiction over the subject matter and because the complaint [failed] to state a claim upon which relief [might] be granted." The dismissal was based on Judge Burke's finding that the defendants were not within the scope of §1983, that the complaint asserted no substantial claim of unconstitutionality, and that the amount in controversy did not exceed $10,000, exclusive of interest and costs.

Judge Burke's dismissal of the complaint was reversed by the United States Court of Appeals for the Second Circuit in *Holley* v. *Lavine*, 529 F.2d 1294 (2d Cir.) (per curiam), *cert. denied*, 426 U.S. 954 (1976). The Second Circuit agreed that the amount in controversy did not exceed $10,000 and that consequently jurisdiction did not lie under 28 U.S.C. §1331. *Id.* at 1295. However, the court found that the complaint stated a substantial claim of unconstitutionality within the scope of §1983 and remanded the case to the district court to consider the plaintiff's statutory and regulatory claims and to convene a three-judge court, if necessary, pursuant to 28 U.S.C. §2281. *Id.* at 1296.

On remand, both defendants answered, and all parties moved for summary judgment. Judge Burke granted the defendants' cross-motions and denied the plaintiff's motion for summary judgment as well as her request to convene a three-judge court to hear the constitutional claims.

The plaintiff appealed and again the case was reversed and remanded in *Holley* v. *Lavine*, 553 F.2d 845 (2d Cir. 1977). The Court of Appeals found that since the plaintiff had official assurance that she would not be deported, at least until her children were no longer dependents, she was "permanently residing in the United States under color of law" within the meaning of the pertinent eligibility regulation promulgated under the Social Security Act. *Id.* at 851. It also stated that its

finding of inconsistency between state law and the applicable federal regulation mooted the issue as to whether state law, "if applied to preclude the payment of A.F.D.C. benefits to an alien not permanently residing lawfully in the United States, would violate the Fourteenth Amendment to the United States Constitution." *Id.* Accordingly, the court held that there was no reason to convene a three-judge court to consider plaintiff's constitutional claims. The case was again remanded to the district court with the following instructions:

> There remains to be considered by the District Court the appropriate form of injunction as well as issues of damages, [cf. *Edelman v. Jordan*, 415 U.S. 651, 667, n. 12, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)] and attorney's fees both in the District Court and in this Court. [See Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2641; *Torres v. Sachs*, 538 F.2d 10 (2nd Cir. 1976).]
>
> Since it appears the original judge might have difficulty in putting aside previously expressed views, and reassignment is advisable to avoid the appearance of prejudgment, the case will be remanded to the District Court for reassignment in keeping with the principles stated in *United States v. Robin*, 553 F.2d 8, 10 (2nd Cir., March 30, 1977).
>
> Reversed and remanded for the issuance of an appropriate injunction, and for consideration of issues of damages and attorney's fees both in the District Court and in this Court.

Id.

On remand, the case was assigned to my part for determination of appropriate relief. The plaintiff seeks a declaration of the invalidity of the statute and an injunction against its enforcement as well as an award of damages, counsel fees, and litigation costs. The damages sought consist of the funds withheld from the plaintiff's public assistance grant as a result of defendant's decision of August 20, 1974.

The issues have been thoroughly briefed by all of the parties. Oral argument was held on May 23, 1978. On August 9, 1978, upon stipulation of the parties, reargument was held in light of the Supreme Court's recent decisions in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) (holding that local governing bodies are subject to suit as "persons" under §1983), and *Hutto v. Finney*, ____ U.S. ____ (1978) (holding that 42 U.S.C. §1988 does not violate the eleventh amendment), and the Second Circuit's decision in *Turpin v. Mailet*, 579 F.2d 152 (2d Cir. 1978).[1] In addition, supplemental briefs were filed with the court. After carefully considering the positions of the parties, I am prepared to rule on the plaintiff's request for relief.

I. *DECLARATORY AND INJUNCTIVE RELIEF*

The Second Circuit in its second decision found that N.Y. Soc. Serv. Law §131-K was inconsistent with the controlling federal regulation, 45 C.F.R. §233.50, because §131-K denied public assistance to New York residents "permanently residing in the United States under color of law." 553 F.2d at 851. Since it also stated that the plaintiff's status was highly unusual, in that she was an illegal alien with official assurance that she would not be deported, the defendants urge the court to limit declaratory and injunctive relief to the facts of this case. But in light of the Second Circuit's determination of inconsistency, I find no basis for doing so. *Cf. Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974). Accordingly, §131-K is declared invalid insofar as it denies public assistance to New York residents permanently residing in the United States under color of law, and the defendants are permanently enjoined from enforcing the statute.

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[1]This case was vacated by the Supreme Court and remanded for reconsideration in light of *Monell v. Department of Social Services, supra. West Haven v. Turpin*, 47 U.S.L.W. 3368 (U.S. Nov. 28, 1978). *See* discussion *infra*.

II. *DAMAGES*

A more difficult question is whether the plaintiff is entitled to recover retroactive welfare payments from the defendants. The plaintiff argues that damages can be awarded on a number of theories. For the reasons outlined below, I find that the state defendant is shielded from a damage award by the eleventh amendment, but that the county defendant is liable for retroactive payments.

A. *STATE DEFENDANT*

The first theory asserted by the plaintiff against the state is that benefits withheld after the complaint was filed on April 17, 1975 can be awarded as ancillary to injunctive relief. In *Edelman v. Jordan*, 415 U.S. 651, 668 (1974), however, the Supreme Court refused to characterize the damages sought in that case as a form of "equitable restitution," recoverable under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), without regard to the eleventh amendment. *D'Iorio v. County of Delaware*, No. 77-1241 (E.D. Pa. Feb. 22, 1978), to the extent it holds otherwise, appears to be inconsistent with *Edelman*. *Mauclet v. Nyquist*, 406 F.Supp. 1233, 1236 (W.D.N.Y. 1976), did not expressly consider whether requalification of the plaintiff as a regents scholarship recipient as of the date the complaint was filed violated *Edelman*.

With the benefit of hindsight, it is clear that most of plaintiff's damages could have been avoided if the district court had correctly applied the law at the time that the plaintiff moved for preliminary relief. But this does not change the retroactive nature of a damage award at this stage of the proceedings. The plaintiff is not seeking a payment of state funds as a necessary consequence of future compliance with a federal court order but rather an award of public assistance payments wrongfully withheld in the past. This type of relief is barred by *Edelman*.

The second theory urged by the plaintiff is that she can recover all benefits wrongfully withheld from January 15, 1975 to April 27, 1977 without regard for the eleventh amendment under the cause of action alleged in the complaint directly under the fourteenth amendment. In support of this theory, the plaintiff cites *Turpin v. Mailet, supra*, which held that a remedy may be implied from the protective provisions of §1 of the fourteenth amendment and that monetary relief is one of the remedies available.

Since oral argument, however, *Turpin* was vacated by the Supreme Court and remanded for consideration in light of *Monell v. Department of Social Services, supra*. *West Haven v. Turpin*, 47 U.S.L.W. 3368 (U.S. Nov. 28, 1978). On remand, the Second Circuit concluded that

> under the very rationale of our prior opinion — there is no place for a cause of action against a municipality directly under the 14th Amendment, because the plaintiff may proceed against the City of West Haven under §1983.

Turpin v. Mailet, No. 77-7345, slip op. at 5405 (2d Cir. Jan. 16, 1979). An additional difficulty with this argument is that it would require a finding of jurisdiction under 28 U.S.C. §1331, which the Second Circuit rejected on the first appeal of this case because the amount in controversy did not exceed $10,000. 529 F.2d at 1295. On remand, this court is bound by the Second Circuit's ruling.

A third theory asserted by the plaintiff rests on the Supreme Court decisions in *Monell, supra* and *Finney, supra*. In light of *Monell*, the plaintiff now has a cause of action under §1983 against the state and county agencies. Based on *Finney*, the plaintiff argues that §1983, like §1988, is a statute which abrogates eleventh amendment immunity.

This argument assumes that *Edelman* has been overruled *sub silento* by the Supreme Court. However, two circuit courts which have considered this question in the wake of *Monell* and *Finney* have concluded that *Edelman* continues to bind federal courts absent a clearer statement from the Supreme Court allowing damage actions against the states under §1983. *Skehan v. Board of Trustees*, 47 U.S.L.W. 2441 (3d Cir. Dec. 21, 1978); *Bogard v. Cook*, No. 76-2890, slip op. at 1534 (5th Cir. Dec. 15, 1978). These conclusions are fully supported by the opinions in *Monell* and *Finney*.

Monell, which found that a local school board was a "person" under §1983, expressly states that its holding is "limited to local government units which are not considered part of the State for Eleventh Amendment purposes." *Supra* at 690 n.54. The reasoning in *Monell* is equally applicable to state agencies and it may be fairly read to subject state agencies to injunctive relief under §1983, but at no point does the decision authorize an award of retroactive damages against the state.

In *Finney*, at least one member of the Court has indicated that the "foundations" of *Edelman* have been "significantly undermined." *Supra* at ____ (J. Brennan, concurring). But the majority opinion cites *Edelman* with approval and characterizes awards of attorneys' fees as noncompensatory litigation costs in order to avoid a conflict between the two cases. Moreover, four of the Justices dissent on the ground that *Edelman* precludes an award of attorneys' fees under 42 U.S.C. §1988. Although the present court does not agree on the proper interpretation of the eleventh amendment, it cannot be said that *Edelman* has been implicitly overruled. I therefore must reject the plaintiff's claim for damages against the state.

B. *COUNTY DEFENDANT*

Different considerations apply in determining whether the plaintiff can recover damages from the county defendant. As a general rule, eleventh amendment immunity does not extend to counties and other local government units. *See, e.g., Moor v. County of Alameda*, 411 U.S. 693, 717-721 (1973). This was recognized by the Supreme Court in *Edelman, supra* at 667 n.12. Only if the county or similar municipal corporation is acting as an arm of the state does it share the state's immunity. *Mount Healthy Board of Education v. Doyle*, 429 U.S. 274, 280 (1977). This rule is equally applicable to agencies of the county, such as local departments of social services and their commissioners.

The question at issue here is whether the state is the real party in interest in the action against the county commissioner and is determined by examining "the nature of the entity created by state law." *Mount Healthy, supra.* A number of factors have been considered by the courts. *Gallagher v. Evans*, 536 F.2d 899, 901 (10th Cir. 1976); *George R. Whitten, Jr., Inc. v. State University Construction Fund*, 493 F.2d 177, 179-80 (1st Cir. 1974); *Urbana v. Board of Managers*, 415 F.2d 247, 250-51 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970); *Krisel v. Doran*, 258 F. Supp. 845, 849 (S.D.N.Y. 1966), *aff'd per curiam*, 386 F.2d 179 (2d Cir. 1967), *cert. denied*, 390 U.S. 1042 (1968). However, the primary consideration in all of the cases, including *Mount Healthy*, is the extent to which the local agency or official is financially independent of the state. *See also Rothstein v. Wyman*, 467 F.2d 226, 236 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973). In *Edelman, supra* at 663, 665, the question was phrased in terms of whether a judgment against the defendant would inevitably be satisfied out of the general revenues of the state. This determination is a matter of federal law, and federal courts are not necessarily bound by state court decisions. *See, e.g., Savage v. Kibbee*, 426 F. Supp. 760, 765 (S.D.N.Y. 1976).

The plaintiff does not dispute that county social services departments are "arms of the state" for the purpose of administering federal welfare programs. This was established recently by the New York Court of Appeals in *Beaudoin v. Toia*, 45 N.Y.2d 343, 408 N.Y.S.2d 417 (1978), which held that a county department of social services has no standing to challenge a fair hearing decision of the State Commissioner of Social Services. Federal law in fact requires this result. 42 U.S.C. §602(a).

But this does not resolve the issue. It is also well established that a judgment against a county department of social services or its commissioner in his official capacity does not bind the state and is not automatically payable out of state funds. *Toia v. Regan*, 387 N.Y.S.2d 309 (App. Div. 4th Dep't), *aff'd per curiam*, 40 N.Y.2d 837, 387 N.Y.S.2d 832 (1976); *Jones v. Berman*, 37 N.Y.2d 42, 371 N.Y.S.2d 422 (1975). The relationship between the state and the county agencies has been described in the following terms:

> Erie County is a duly established county social services district (Social Services Law, §§52, 61[3]). As such, it bears ultimate responsibility for the administration of public assistance and care for its residents although it may share this responsibility, under certain circumstances, with other municipalities located within its territorial boundaries (Social Services Law, §69). An important element of this responsibility is the mandatory duty of the County's board of supervisors "to make adequate appropriations * * * to provide the public assistance and care required by * * * [the Social Services Law]" (Social Services Law, §88). Additionally, the County is specifically obligated to make deficiency appropriations, should the need arise, to fulfill its public assistance responsibilities with regard to both home relief (Social Services Law, §93[3], [6]) and the federally-aided programs of aid to dependent children and medical assistance (Social Services Law, §92[1] [a], [c]). The Social Services Law does provide for reimbursement by the State for

> fifty percent of the nonfederally reimbursed cost of these programs, including day care (Social Services Law, §§153[1] [d], [e], 368-a[1] [d], 410-c[1] [a]). Further, the statute places the power over the administration and regulation of this system of public assistance and care largely in the hands of the State Department of Social Services and its Commissioner (Social Services Law, §§17, 20, 34).
>
> [1] This legislative scheme, then, focuses day-to-day administrative duties upon the county social services districts while concentrating policy and rule-making authority in the state agency. It also establishes an affirmative burden upon the county social services districts to appropriate necessary funding for the operation of these public assistance programs but, then, eases this burden by providing for fifty percent state reimbursement of all such funding not otherwise subject to federal reimbursement.

Toia v. Regan, 387 N.Y.S.2d at 312.[2]

Under this scheme, county governments have an obligation to finance public assistance payments even if higher levels of government refuse to reimburse the county. *See, e.g., Jones v. Berman, supra.* Although in most cases state and federal funding is available for reimbursement, there is no clear rule requiring the state to indemnify the counties for judgments entered against them. Moreover, only fifty percent of the nonfederal share of public assistance payments under the A.F.D.C. program is reimbursed by the state. For these reasons, I find that the county defendant is not an arm of the state for eleventh amendment purposes.

This conclusion is supported by the Seventh Circuit's decision in *Mackey v. Stanton*, No. 78-1513 (7th Cir. Nov. 8, 1978), the only case directly in point brought to the court's attention. On

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[2]The references to Erie County are equally applicable to Monroe County.

similar facts, the court found that an award of retroactive public assistance benefits could be entered against a county social services agency and its officials in Indiana. It reached its conclusion by applying the analysis used by the Supreme Court in *Mount Healthy* to Indiana's funding scheme. Summarizing its analysis, the court stated:

> In all respects that the Supreme Court seemed to consider significant in Mt. Healthy, the county department here is similar to the school board in that case. Although both are subject to state supervision and depend heavily on state funds, they perform their duties on a local level. More important, both have the power to raise their own funds by tax levy and by bond issuance. Significantly, Ind. Code Ann. §12-1-11-13 (Burns) is analogous to Ohio Rev. Code Ann. §133.27 (Page), providing a manner for payment of judgments without resort to the state treasury.

Although the New York scheme differs from Indiana's in that county social services departments in New York must rely on local legislative bodies for funding, the power and the duty to raise and appropriate welfare funds nevertheless rest at the local rather than the state level. The only other significant difference between the New York and the Indiana schemes makes it clear that counties in New York are less dependent on state funds than counties in Indiana. Only 50% of non-federal funds paid to A.F.D.C. recipients in New York are reimbursed by the state whereas in Indiana the state reimburses the counties for 100% of their expenditures. In New York, it cannot even be said that a judgment against the county social services commissioner is indirectly payable out of state funds.

Although it may seem unfair to hold local communities responsible for funding public assistance and for paying court-ordered awards of retroactive assistance at the same time that administrative policies are dictated by the state and federal

governments, any unfairness is a consequence of the New York legislature's decision to place the responsibility for funding public assistance on the localities. The constitutionality of this scheme was upheld by the New York Court of Appeals in *Toia v. Regan, supra.* Under the federal A.F.D.C. program, each state is free to choose the administrative system most appropriate to its needs. *Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck,* 463 F.2d 620, 624 (2d Cir. 1972), *cert. denied,* 410 U.S. 944 (1973). A state that opts for direct state administration and financing presumably could assert the eleventh amendment as a complete bar to retroactive monetary liability in a case such as this. But New York has not chosen such a system.

The county defendant is directed to reimburse the plaintiff for public assistance benefits withheld as a result of the ineligibility determination at issue in this case.

III. *ATTORNEY'S FEES*

The final issue before the court is the plaintiff's entitlement to an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. For the reasons stated below, I find that the defendants are liable for a fee award under §1988.

The Supreme Court's decision in *Finney* squarely rejected the main argument raised by the defendants against an award by holding that the eleventh amendment does not bar an award of attorneys' fees or costs against the state in §1983 actions. The defendants now argue that it would be unfair to penalize them for their good faith efforts to implement the federal regulation, which they claim is ambiguous.

In §1983 cases, fees should ordinarily be awarded to successful plaintiffs unless special circumstances would make such an award unjust. *Mid-Hudson Legal Services v. G. & U., Inc.,* 578

F.2d 34, 37-38 (2d Cir. 1978). *Zarcone v. Perry*, 581 F.2d 1039, 1044 (2d Cir. 1978), outlines the underlying factors to be considered in applying the *Newman-Northcross* rule to attorney's fees applications in §1983 actions. These factors, when applied to this case, support the plaintiff's position.

The plaintiff sought and obtained broad equitable relief which will benefit resident aliens in addition to the plaintiff. Although the size of the group affected by this litigation may not be large, the claim involved significant federal rights. Because the plaintiff's claim did not involve substantial monetary damages and is one which many United States citizens would regard as unpopular, it is highly unlikely that the plaintiff could have retained other counsel to act on her behalf. The cost of this litigation and the time and effort required by plaintiff's counsel in order to bring the case to its conclusion, especially in light of the two appeals involved, plainly were disproportionate to any sum the plaintiff might reasonably have expected to recover on her own behalf. All of these circumstances justify an award of fees to the plaintiff. *Zarcone, supra; Mauclet v. Nyquist*, No. 75-73 (W.D.N.Y. Oct. 20, 1978).

The defendants have failed to point to any circumstances which would render an award unjust. Good faith alone does not preclude an award of attorney's fees. *Mid-Hudson, supra.* The risk of incurring liability for good faith mistakes in interpreting federal requirements is one of the risks which the state assumes when it participates in the federal A.F.D.C. program. Although the defendants argue that the federal regulation involved in this case is ambiguous, this litigation might have been avoided had the state enacted the federal language.

Finally, it is well established that attorneys who provide legal services for free or for nominal rates are nevertheless entitled to recover fees under §1988. *See, e.g., Mid-Hudson, supra; Beazer v.*

New York City Transit Authority, 558 F.2d 97 (2d Cir. 1977). In light of all of these considerations and in the exercise of my discretion, I find that the plaintiff's motion for attorneys' fees should be granted.

The parties are directed to meet and attempt to agree upon a reasonable amount of a fee award and to report to the court in thirty (30) days from the date of this order.

So ordered.

/s/ JOHN T. CURTIN
United States District Judge

DATED: February 1, 1979

APPENDIX B

(Opinion of the Court of Appeals)

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 1152, 1153, 1154 — August Term, 1978.

(Argued June 1, 1979 Decided July 13, 1979.)

Docket Nos. 79-7182, 79-7190, 79-7207

GAYLE McQUOID HOLLEY, individually and on behalf of JAMES McQUOID, NORMAN McQUOID, THOMAS McQUOID, DOUGLAS McQUOID, MICHAEL McQUOID, and ADELAINE McQUOID, her minor children,

Plaintiff-Appellee-Cross-Appellant,

vs.

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and

JAMES REED, as Commissioner of the Monroe County Department of Social Services,

Defendants-Appellants-Cross-Appellees.

Before:

FRIENDLY and FEINBERG, *Circuit Judges*, and NEAHER, *District Judge.* *

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*Hon. Edward R. Neaher, of the United States District Court for the Eastern District of New York, sitting by designation.

APPENDIX B (Opinion of the Court of Appeals)

Appeal and cross-appeal from judgment of United States District Court for the Western District of New York, John T. Curtin, Ch. J., awarding retroactive welfare benefits against a County Commissioner of Social Services, denying such an award against a State Commissioner of Social Services, enjoining in part application of a State Social Services law and awarding attorneys' fees to plaintiff against both the County and State Commissioners of Social Services.

Judgment affirmed and cross-appeal dismissed.

K. WADE EATON, Rochester, N.Y. (Greater Up-State Law Project, Rochester, N.Y.), *for Plaintiff-Appellee-Cross-Appellant Gayle McQuoid Holley.*

ALAN W. RUBENSTEIN, Principal Attorney, Albany, N.Y. (Robert Abrams, Attorney General of the State of New York, Jeremiah Jochnowitz, Assistant Solicitor General, Albany, N.Y., of Counsel), *for Defendant-Appellant-Cross-Appellee Abe Lavine, Commissioner of the New York State Department of Social Services.*

CHARLES G. PORRECA, Rochester, N.Y. (Monroe County Department of Social Services, Sam DiLalla, Acting Chief Counsel, of Counsel), *for Defendant-Appellant-Cross-Appellee James Reed, Commissioner of the Monroe County Department of Social Services.*

FEINBERG, *Circuit Judge:*

This case raises difficult issues of application of the Eleventh Amendment in suits involving welfare benefits. For reasons given below, we affirm a district court judgment that awards plaintiff such benefits retroactively against a County Social Services Commissioner, denies such an award against a State

Social Services Commissioner and awards counsel fees to plaintiff against both defendants.

In April 1975, Gayle McQuoid Holley, individually and on behalf of her six children, sued Abe Lavine, then Commissioner of the New York State Department of Social Services, and James Reed, then Commissioner of the Monroe County Department of Social Services, in the United States District Court for the Western District of New York.[1] Plaintiff Holley was then (and presumably still is) an "illegal" alien, but her six children are all American citizens, since they were born in this country. Although plaintiff came here illegally, the Immigration and Naturalization Service for humanitarian reasons has allowed plaintiff to remain in this country, to prevent the separation of mother and children. Plaintiff's complaint sought an order requiring defendants to restore a one-seventh cut in benefits under the Aid to Families with Dependent Children (AFDC) program and invalidating section 131-k of the New York Social Services Law, insofar as it deprives certain illegal aliens of AFDC benefits.[2] In the period since plaintiff filed her complaint

[1]For convenience only, we will call the County Commissioner the County defendant and the State Commissioner the State defendant.

[2]New York Social Services Law §131-k provides:

1. Any inconsistent provisions of this chapter or other law notwithstanding, an alien who is unlawfully residing in the United States or who fails to furnish evidence that he is lawfully residing in the United States shall not be eligible for aid to dependent children, home relief or medical assistance.

2. An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical assistance because he is an alien unlawfully residing in the United States or because he failed to furnish evidence that he is lawfully residing in the United States shall be immediately referred to the United States immigration and naturalization service, or the nearest consulate of the country of the applicant or the recipient for such service or consulate to take appropriate action or furnish assistance.

over four years ago, her case has twice been in both this court and in the Supreme Court, and she now appears here for the third time, on this occasion as appellee and cross- appellant. A brief summary of what has transpired follows:

In July 1975, the district court dismissed plaintiff's complaint for lack of jurisdiction and for failure to state a claim on which relief might be granted. This court reversed, holding that plaintiff had alleged a constitutional claim under 42 U.S.C. § 1983 substantial enough to confer jurisdiction under 28 U.S.C. § 1343(3). Holley v. Lavine, 529 F.2d 1294 (2d Cir.) (per curiam), cert. denied, 426 U.S. 954 (1976). Plaintiff's constitutional claim is that denial of AFDC benefits fairly discriminates against those few "illegal" aliens in her unusual situation, denying equal protection of the laws to her own right and to her six children who, although citizens, are also penalized by the reduction in household benefits. In our prior opinion, we noted that while only a three-judge court could, under the law at that time, decide this claim, plaintiff also alleged that section 131-k conflicts both with provisions of the Social Security Act[3] and with an HEW regulation.[4] The basis of this claim was that these require aid to be given to otherwise eligible persons who are aliens "lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law" and that plaintiff resides here "under color of law," because the immigration authorities have allowed her to stay. 529 F.2d at 1296. We further observed that the district court had "pendent jurisdiction" over these "claims of conflict between New York State and federal law," which a single district judge could decide. Id.

[3]42 U.S.C. §§601, 602(a)(10) and 606(b)(1).

[4]45 C.F.R. §233.50.

We remanded the case to the district court where all parties moved for summary judgment. The district court again decided for defendants, this time on the ground that the New York statute did not conflict with the Social Security Act and the regulation. Plaintiff appealed to this court, and we again reversed the judgment of the district court. Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), cert. denied. 435 U.S. 947 (1978). We pointed out that "plaintiff is in what is almost certainly a minuscule sub-class of aliens who, although unlawfully residing in the United States, are each individually covered by a letter [from the Government] stating that [it] 'does not contemplate enforcing . . . [the alien's] . . . departure from the United States at this time.'" 553 F.2d at 849. We went on to hold that in this

> unusual situation where an alien parent has an official assurance that the parent will not be deported at least until the children are no longer dependent on that parent, such parent is "permanently residing in the United States under color of law."

Id. Therefore, section 131-k was, at least as applied to plaintiff Holley and her class, in conflict with the governing federal law, and the reduction in benefits was improper. On this theory, it was unnecessary to decide the equal protection issue. We again remanded the case to the district court (assigning it to another judge) to consider the appropriate form of injunction and issues of damages and attorneys' fees. 553 F.2d at 851.

In the district court, the case was reassigned to Chief Judge John T. Curtin. After further argument and briefing, the judge granted plaintiff's motion for a permanent injunction against enforcement of the applicable portion of section 131-k, directed the County defendant "to reimburse the plaintiff for public assistance benefits withheld as a result of the ineligibility determination."[5] and awarded plaintiff counsel fees against both

[5]The amount of plaintiff's damages was subsequently fixed at $1,400 in an amended judgment.

the State and County defendants.[6] However, on Eleventh Amendment grounds, the judge denied plaintiff an award of retroactive benefits against the State defendant. Judge Curtin's thorough opinion is reported at 464 F. Supp. 718 (W.D.N.Y. 1977). On this third appeal to this court, the County defendant argues that the Eleventh Amendment also bars an award of benefits against him, as does the defense that he acted in good faith. Both defendants also offer various reasons why the grant of attorneys' fees is not proper. Plaintiff cross-appeals, arguing that she should have been awarded back payments against the State defendant as well as against the County defendant, and offers an elaborate alternative theory to justify that result.

Appeal of the County Defendant

The district court held that the Eleventh Amendment did not bar an award of retroactive AFDC benefits to plaintiff against the County defendant. That Amendment, which has received increased judicial attention in the last decade, provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

In Edelman v. Jordan, 415 U.S. 651 (1974), the Supreme Court held that the Amendment prohibited that portion of a federal district court's decree that ordered Illinois state officials to pay

[6]We are advised that the parties have agreed that the proper amount of attorneys' fees is $10,000. Under the circumstances, we are not disposed to take too technical a view on whether there now is an appealable final judgment under 28 U.S.C. §1291. Cf. Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66, 70 n.2 (2d Cir. 1973); Fase v. Seafarers Welfare & Pension Plan, 589 F.2d 112, 114-15 n.3 (2d Cir. 1978).

retroactive public assistance benefits.[7] In this case, Judge Curtin relied on *Edelman v. Jordan* in refusing to grant damages against the State defendant but went on to hold that the County defendant is not an arm of the State for purposes of Eleventh Amendment immunity. The correctness of this ruling is the key issue on the County defendant's appeal.

We start with the proposition reaffirmed in Edelman v. Jordan, supra, 415 U.S. at 667 n.12, that "a county does not occupy the same position as a State for purposes of the Eleventh Amendment." The same footnote states that "while county action is generally state action for purposes of the Fourteenth Amendment," as plaintiff alleged here in her section 1983 action, "a county defendant is not necessarily a state defendant for purposes of the Eleventh Amendment." Id. Subsequently, in Mt. Healthy City Board of Educ. v. Doyle, 429 U.S. 274, 280 (1977), the Court characterized the relevant issue as whether the School Board defendant there was "to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or . . . as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." In the same passage the Court also stated that "[t]he bar of the Eleventh Amendment . . . does not extend to counties and similar municipal corporations." Since defendant James Reed, as Commissioner of the Monroe County Department of Social Services, is concededly an employee of Monroe County, it is arguable that this fact, under the Court's criteria, resolves the issue here. But defendants argue that local social services agencies, unlike counties, are considered to be "arm[s] of the

[7]The benefits were provided under federal-state programs of Aid to the Aged. Blind or Disabled (AABD). For Eleventh Amendment purposes we see no distinction between the AABD benefits in that case and the AFDC benefits here.

State" since they are a part of, and supervised by, the State Department of Social Services.[8]

Defendants stress that in *Mt. Healthy*, supra, 429 U.S. at 280, the Court pointed out that the answer to the Eleventh Amendment inquiry "depends, at least in part, upon the nature of the entity created by state law." According to defendants, we must first look to the New York State constitution, which provides that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." N.Y. Const. art. 17, § 1. Thus, as defendants contend, the state legislature has been given the power under state law to control the public welfare system and to determine the manner and means of providing public assistance to the people in the state. The state legislature has divided the state into "county and city social services districts," N.Y. Soc. Serv. Law § 61, of which Monroe County is one. And the responsibilities of a commissioner of a County Department of Social Services, like defendant James Reed here, are essentially to administer, N.Y. Soc. Serv. Law § 65, rather than to make, policy. Defendants tell us that the Monroe County Department of Social Services differs from other Monroe County departments because it has its own legal staff to handle welfare matters exclusively and, unlike the County of Monroe itself, is truly "an arm of the State."

These are substantial arguments, and one does not speak with confidence in this complex and difficult area. See generally Baker, Federalism and the Eleventh Amendment, 48 U. Colo. L. Rev. 139 (1977). It is true that the state constitution gives great discretion to the state legislature in dealing with public

[8]The State and County defendants offer similar arguments on this issue. For convenience, we will consider together the contentions of both defendants and not distinguish between them.

assistance. But that legislature has seen fit to create local social service districts, which are required by law to provide for the "assistance and care of any person . . . who is in need of public assistance and care which he is unable to provide for himself." N.Y. Soc. Serv. Law § 62(1). Moreover, section 88 of the New York Social Services Law makes it "the duty of the board of supervisors of a county, the town board of a town and the appropriating body of a city to make adequate appropriations and to take such an action as may be necessary to provide the public assistance and care required by this chapter." Although it is not completely clear from this language that "the public assistance and care required by this chapter" includes participation in the federally-assisted AFDC program as distinguished from general welfare payments, this seems to be assumed in Jones v. Berman, 37 N.Y.2d 42 (1975). That the State controls the policies of the County Department of Social Services is not decisive on the Eleventh Amendment issue. In Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 99 S.Ct. 1171, 1177 (1979), the Court noted that it has "consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'" Of much greater significance is the entity upon whom rests the primary obligation to make payments to the AFDC recipient, and as discussed below, that entity appears to be the County.

In minimizing the County's obligation, defendants emphasize that only 25 percent of the AFDC program is ultimately funded by the County, since 50 percent is paid for by the federal government and 25 percent by the State. If anything, this cuts against defendants' argument. It is one thing to indulge in the semi-fiction that a state needs Eleventh Amendment protection for the full amount of a judgment against a state commissioner for past AFDC benefits, when half of the money will come back

to the state from the federal government. The argument becomes strained when the judgment is against the County defendant and the State will eventually bear only 25 percent of the total. Defendants also argue that if New York State had chosen, as some states do, to administer public assistance payments directly rather than through county social services districts, the Eleventh Amendment would have been a bar and it is therefore capricious not to apply it here. But, as Judge Curtin correctly pointed out, "any unfairness is a consequence of the New York legislature's decision to place the responsibility for funding public assistance on the localities," 464 F. Supp. at 725.

Defendants also stress that the State advances money to the County in anticipation of reimbursable local expenditures for public assistance and care. But this is a matter of administrative convenience. It seems to us more important that the County defendant would be liable to an AFDC recipient even if the State did not advance the money. Monroe County has its own taxing authority, N.Y. Const. art. 8, § 10; N.Y. County Law §§ 233, 233-a(1) (4), is an independent political entity, N.Y. County Law, § 3, appoints the local County commissioner who is a defendant here, County Law §400(4) (b), and bears "ultimate responsibility" for public assistance payments. Toia v. Regan, 54 A.D.2d 46, 50 (4th Dept.), aff'd, 40 N.Y.2d 837 (1976), appeal dismissed, 429 U.S. 1082 (1977). Moreover, "the county's duty to provide assistance is not dependent upon the receipt of equivalent money from the State and the cases have so held." Jones v. Berman, supra, 37 N.Y.2d at 55. That the State chooses to reimburse the County defendant for 25 percent of the total retroactive payment should not be controlling on this issue.[9] We believe that Eleventh

[9]Judge Curtin noted that:

> Although in most cases state and federal funding is available for reimbursement, there is no clear rule requiring the state to indemnify the counties for judgments entered against them.

464 F. Supp. at 724.

Amendment protection of the county defendant is not necessary "in order to protect the state treasury from liability that would have ... essentially the same practical consequences as a judgment against the State itself." Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra, 99 S.Ct. at 1177.[10] Under all the circumstances, we conclude that the County defendant should not be treated as "an arm of the State" for Eleventh Amendment purposes.

The remaining contentions of the County defendant require less extended discussion. The claim is made that since the County Commissioner acted in good faith in relying on section 131-k, under such cases as Wood v. Strickland, 420 U.S. 308 (1975), and O'Connor v. Donaldson, 422 U.S. 563 (1975), he should not be held liable. This defense was developed so that a public official, bound to take discretionary action of many sorts, often on short notice, should not be burdened by liability or fear of it because "of mistakes made in good faith in the course of ... his official duties," Wood v. Strickland, 420 U.S. 308, 319 (1975) (school officials); O'Connor v. Donaldson, 422 U.S. 563, 576-77 (1975) (employee of state mental hospital); Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1347-48 (Medina, J.), 1348-49 (Lumbard, J.) (2d Cir. 1972) (on remand) (narcotics

[10] Plaintiff and defendants each cite to us a different decision of the Seventh Circuit in support of their positions. In Mackey v. Stanton, 586 F.2d 1126 (7th Cir. 1978), petition for cert. filed, 47 U.S.L.W. 3776 (May 17, 1979) (No. 78-1733), the court held the Eleventh Amendment did not bar a judgment against a county's welfare department. Conversely, in Carey v. Quern, 588 F.2d 230 (7th Cir. 1978), the Amendment was a bar. We regard these Seventh Circuit cases as inconclusive and distinguishable. *Mackey* dealt with an Indiana county's diversion of court-ordered child support payments which, in the absence of its action, would have gone to the beneficiaries, in *Carey v. Quern*, the public assistance taxes collected by the City of Chicago were paid into a special purpose trust fund and amounted to only five percent of total disbursements, the rest "supplied by the State of Illinois." 588 F.2d at 233 n.5.

agents). Here, as we now know after years of litigation, Reed had no discretion; the money belonged to Mrs. Holley. There can be no good faith defense to a claim for AFDC benefits that have been found to be due and owing. Moreover, there should be no good faith defense to a claim for AFDC benefits that were wrongfully withheld, since such an award puts defendants in no worse position than if they had initially complied with their obligation. See Schnapper, Civil Rights Litigation After *Monell*, 79 Colum. L. Rev. 213, 252 (1979). Such benefits seem quite different from damages under 42 U.S.C. § 1983 for violation of constitutional rights of the sort involved in Monell v. Department of Social Services, 436 U.S. 658 (1978), in which the Supreme Court alluded to the possibility of "some sort of official immunity" for "local government bodies." Id. at 701.[11]

Finally, even if the Eleventh Amendment does not apply, we are urged to deny retroactivity under the criteria listed in the alternative holding in Rothstein v. Wyman, 467 F.2d 226, 232-36 (2d Cir. 1972), cert. denied, 411 U.S. 92 (1973). We do not regard the district court's rejection of this argument as "an improvident exercise of its equity powers," id. at 236, in view of the insubstantial fiscal effect of giving a remedy to plaintiff's "minuscule sub-class" and the recognition by the New York courts of the propriety of retroactive relief in welfare benefits

[11] At the end of his opinion for the majority, Justice Brennan stated:

> Since the question whether local government bodies should be afforded some form of official immunity was not presented as a question to be decided on this petition and was not briefed by the parties or addressed by the courts below, we express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under §1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under §1983 "be drained of meaning," *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974). Cf. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397-98 (1971).

436 U.S. at 701.

cases. See Uhrovick v. Lavine, 43 A.D.2d 481, 484 (3d Dept.), aff'd, 35 N.Y.2d 892 (1974) ("to do otherwise would permit a State to violate Federal requirements with financial impunity . . . ."); Martin v. Lavine, 47 A.D.2d 731 (1st Dept. 1975), modified on other grounds, 39 N.Y.2d 72 (1976); Stewart v. Smith, 57 A.D.2d 897, 898 (2d Dept. 1977).

Turning to the award of counsel fees to plaintiff, the County defendant argues that in the interest of justice the district court should have denied such fees. The chief reasons given are that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, was enacted after plaintiff Holley commenced her action, so that she had neither a need for such a fee to guarantee access to the courts nor a reasonable expectation of obtaining one; that the legal services available to plaintiff are federally funded; and that there was no bad faith by the County defendant here. But recent decisions of the Supreme Court and of this court make clear that none of these factors prevents an award of attorneys' fees as a matter of law. See, e.g., Hutto v. Finney, 437 U.S. 678, 693-700, 694 n.3 (1978); Gagne v. Maher, 594 F.2d 336, 345 (2d Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3001 (June 21, 1979) (No. 78-1888); Zarcone v. Perry, 581 F.2d 1039, 1044 (2d Cir. 1978); Mid-Hudson Legal Services, Inc. v. G & U, Inc., 578 F.2d 34 (1978). Nor is it a bar to such an award that the district court never decided the constitutional issue that was the basis of jurisdiction under 28 U.S.C. § 1343(3). Gagne v. Maher, supra, 594 F.2d at 339-41. The attorneys' fees issue is committed to the discretion of the trial judge, id. at 345, who in this case pointed out

> The plaintiff sought and obtained broad equitable relief which will benefit resident aliens in addition to the plaintiff. Although the size of the group affected by this litigation may not be large, the claim involved significant federal rights. Because the plaintiff's claim did not involve substantial monetary damages and is one which

> many United States citizens would regard as unpopular, it is highly unlikely that the plaintiff could have retained other counsel to act on her behalf. The cost of this litigation and the time and effort required by plaintiff's counsel in order to bring the case to its conclusion, especially in light of the two appeals involved, plainly were disproportionate to any sum the plaintiff might reasonably have expected to recover on her own behalf. All of these circumstances justify an award of fees to the plaintiff.

464 F. Supp. at 725. We see no abuse of discretion here.

Appeal of the State Defendant

The State was successful below on its Eleventh Amendment claim and a number of its arguments on appeal are merely supportive of the County defendant's position. Thus, as already noted, the State defendant argues that since the County defendant is an arm of the State for Eleventh Amendment purposes, retroactive payments were improper and that an award of attorneys' fees against either defendant was inappropriate, particularly since the Eleventh Amendment, as the district court recognized, barred the damage award against the State defendant. We see no need to add to our previous discussion except to point out that Hutto v. Finney, supra, 437 U.S. at 693-98, specifically rejected the latter argument. See also Gagne v. Maher, supra, 594 F.2d at 341-43.

At oral argument, the State also contended that under the Supreme Court's very recent decision in Chapman v. Houston Welfare Rights Organization, 47 U.S.L.W. 4528 (May 14, 1979), the district court did not have jurisdiction over plaintiff's claim that section 131-k conflicted with federal law. *Chapman* held that 28 U.S.C. § 1343(3) and (4) did not independently give federal district courts jurisdiction over such claims, confirming our

earlier ruling in Andrews v. Maher, 525 F.2d 113 (2d Cir. 1975). But jurisdiction over the statutory claim here is not original, but pendent, as we held in our two prior opinions in this case. We do not read *Chapman* as barring the exercise of jurisdiction over the pendent claim here, which, as we see it, could be based upon either a federal or state cause of action. As to the former, it has generally been assumed that there is a federal cause of action to enforce the Social Security Act and HEW Regulations and that such "suits in federal court under § 1983" are proper, see Edelman v. Jordan, supra, 415 U.S. at 675-77; Rosado v. Wyman, 397 U.S. 397 (1970).[12] Although Justice Powell took the position in *Chapman* that there is no cause of action under section 1983 for violations of the Social Security Act, 47 U.S.L.W. at 4534-40 (Powell, J., concurring), only two other Justices joined in this view, while four Justices disagreed and two took no position.[13] The Justices did not deal with whether a private cause of action could be implied directly from the Social Security Act, see, e.g., Cannon v. University of Chicago, 47 U.S.L.W. 4549 (May 14, 1979); Cort v. Ash, 422 U.S. 66, 78 (1975), which a federal district court would have jurisdiction to hear under the general federal question statute, 28 U.S.C. § 1331(a). Of course, welfare benefits cases do not ordinarily involve $10,000 so that the jurisdictional amount requirement would generally not be satisfied in suits

[12]Of course, since the cause of action does not meet the jurisdictional requirements of 28 U.S.C. §1343(3), it has had to be presented as a pendent claim to another §1983 cause of action that asserts a violation of a right secured by the Constitution or any Act of Congress providing for equal rights, and therefore does meet the requirements of §1343(3).

[13]Justice Powell's opinion was joined by Chief Justice Burger and Justice Rehnquist. Justice White, also concurring, disagreed with Justice Powell on this point, as did Justice Stewart in his dissenting opinion, joined in relevant part, by Justices Brennan and Marshall. Justices Stevens and Blackmun did not find it necessary to reach the issue, see 47 U.S.L.W. at 4533.

against state defendants.[14] But the absence of the jurisdictional amount should not be controlling here when the district court already has jurisdiction over the equal protection claim. Moreover, plaintiff also has a state cause of action. The State defendant itself points out that plaintiff could have sued in the state courts for wrongfully withheld benefits, see Papadopoulous v. Shang, 414 N.Y.S.2d 152 (App. Div. 1st Dept. 1977). Under United Mine Workers v. Gibbs, 383 U.S. 715 (1966), the district court had discretion to exercise jurisdiction over such a state cause of action. Certainly on these facts, the federal court is an appropriate forum to adjudicate the claim of conflict between federal and state law. See Hagans v. Lavine, 415 U.S. 528, 548 (1974); Rosado v. Wyman, supra, 397 U.S. at 422-23; Andrews v. Maher, supra, 525 F.2d at 120. Cf. Frost v. Weinberger, 515 F.2d 57, 62 (2d Cir. 1975), cert. denied, 424 U.S. 958 (1976). See also Friendly, Federal Jurisdiction: A General View 123 (1973).

The State defendant also briefly attacks the scope of the declaratory and injunctive relief granted by the district court. The injunction requires the defendants to abide by the HEW regulation; indeed, the language of the order is the language of the regulation. We see neither failure to follow our earlier mandate nor overbreadth in this. The rest of the State's brief is an anticipatory defense to arguments of plaintiff in her cross-appeal, to which we now turn.

[14]There is now no such an amount-in-controversy requirement for suits against federal defendants, see 28 U.S.C. §1331(a), as amended by Pub. L. No. 94-574, §2, 90 Stat. 2721 (1976). In 1978, the House of Representatives passed legislation that would remove the jurisdictional amount requirement in federal question cases, H.R. 9622, 95th Cong., 2nd Sess., 124 Cong. Rec. 1553, 1569 (Feb. 28, 1978), and both houses of Congress are currently considering such bills.

Cross-Appeal of Plaintiff

In her cross-appeal, which is concededly filed for protective purposes only, plaintiff argues at great length that the district court erred in not granting damages against the State as well as against the County. Plaintiff offers an elaborate theory to justify that result. First, she asserts her constitutional claim as an implied right of action based directly on the equal protection clause of the Fourteenth Amendment, under Davis v. Passman, 47 U.S.L.W. 4643 (June 5, 1979); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979) (en banc). She argues for the right to assert this implied action even though she has an explicit right of action under 42 U.S.C. § 1983 because under that section she cannot get retroactive relief from the State. See Quern v. Jordan, 47 U.S.L.W. 4241 (March 5, 1979). Second, plaintiff deals with the problem of jurisdiction for this *Bivens*-type action as follows. General federal question jurisdiction under 28 U.S.C. § 1331 is unavailable because, as we have previously held, 529 F.2d at 1295, the jurisdictional amount is not met. However, plaintiff asserts that pendent jurisdiction is available and that the Fourteenth Amendment claim can be appended to her identical section 1983 claim, over which the district court had jurisdiction under 28 U.S.C. § 1343(3), which requires no jurisdictional amount. Next, plaintiff urges that the State's action in depriving her sub-class of illegal aliens of AFDC benefits violates the equal protection clause. Finally, she claims that the Eleventh Amendment does not protect states against damage actions brought directly under the Fourteenth Amendment.

Merely stating this complicated theory indicates the scope of the problems involved in ruling upon it. For example, decision for plaintiff would require at the very least determination of the equal protection question on the merits, something which none

of the courts that have considered this case have done to date. It would also require holding that an implied right of action under the Fourteenth Amendment overrides the Eleventh Amendment. This would be a rather large extension of the Court's decision in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), that Congress, acting pursuant to section five of the Fourteenth Amendment, can override the Eleventh Amendment by manifesting an explicit intent to do so in a statute, Title VII in that case. Cf. Jagnandan v. Giles, 538 F.2d 1166, 1182-85 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977). However, we see no persuasive reason to consider these matters. We have already concluded that plaintiff is entitled to a judgment against the County defendant for the same amount she could recover against the State defendant. Under the circumstances, we will leave to another day consideration of plaintiff's alternative theory.

In conclusion, on the appeal of the County and State defendants, we affirm the judgment of the district court in all respects. We dismiss plaintiff's cross-appeal. In our discretion, we direct that no additional amount for attorneys' fees and no costs be awarded to either party in connection with these appeals.

APPENDIX C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of July one thousand nine hundred and seventy-nine.

United States Court of Appeals
Second Circuit
Filed Jul 13 1979
A. Daniel Fusaro, Clerk

Present: HON. HENRY J. FRIENDLY, *Circuit Judge;* HON. WILFRED FEINBERG, *Circuit Judge;* HON. EDWARD R. NEAHER, *District Judge.*

GAYLE McQUOID HOLLEY, Individually and on behalf of JAMES McQUOID, NORMAN McQUOID, THOMAS McQUOID, DOUGLAS McQUOID, MICHAEL McQUOID, AND ADELAIDE McQUOID, her minor children,
Plaintiff-Appellant-Cross-Appellee

v.

BARBARA B. BLUM, as Commissioner of the New York State Department of Social Services (successor in office and function to Abe Lavine, etc. et ano.,
Defendants-Appellees-Cross-Appellants.

79-7182, 79-7190, 79-7207

Civ-75-151

APPENDIX C (Judgment of the Court of Appeals)

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed and the cross-appeal dismissed without costs in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

BY: SARA PIOVIA,
Deputy Clerk

APPENDIX D

42 U.S.C. §602 (a) (1) (2) (3)

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary

(a) A State plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan.

APPENDIX E

42 U.S.C. §1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. §1979.

Historical Note

Derivation. Act Apr. 20, 1871, c. 22, § 1, 17 Stat. 13.

APPENDIX F

45 CFR 205.100 (a)(1)(i) & (b)(1)(3)

§ 205.100 Single State agency.

(a) (1) *State plan requirements.* A State plan under title I, IV-A, VI, X, XIV, XVI, or XIX of the Social Security Act must:

(i) Provide for the establishment or designation of a single State agency with authority to administer or supervise the administration of the plan.

• • •

(b) *Conditions for implementing the requirements of paragraph (a) of this section.* (1) The State agency will not delegate to other than its own officials its authority for exercising administrative discretion in the administration or supervision of the plan including the issuance of policies, rules, and regulations on program matters.

• • •

(3) In the event that any services are performed for the single State agency by other State or local agencies or offices, such agencies and offices must not have authority to review, change, or disapprove any administrative decision of the single State agency, or otherwise substitute their judgment for that of the agency as to the application of policies, rules, and regulations promulgated by the State agency.

APPENDIX G

45 CFR 205.120 (a)

§ 205.120 Statewide operation.

(a) *State plan requirements.* A State plan under title I, IV-A, VI, X, XIV, XVI, or XIX of the Social Security Act must provide that:

(a) It shall be in operation, through a system of local offices, on a statewide basis in accordance with equitable standards for assistance and administration that are mandatory throughout the State;

(2) If administered by political subdivisions of the State, the plan will be mandatory on such political subdivisions;

(3) The State agency will assure that the plan is continuously in operation in all local offices or agencies through;

(i) Methods for informing staff of State policies, standards, procedures and instructions; and

(ii) Regular planned examination and evaluation of operations in local offices by regularly assigned State staff, including regular visits by such staff; and through reports, controls, or other necessary methods.

APPENDIX H

New York Social Services Law §17 (a)

§ 17. Powers and duties of the commissioner.

The commissioner shall

(a) determine the policies and principles upon which public assistance, services and care shall be provided within the state both by the state itself and by the local governmental units within the limits hereinafter prescribed in this chapter;

APPENDIX I

New York Social Services Law §20 (2)

§ 20. Powers and duties of the department.

2. The department shall, as provided in this chapter:

(a) administer all the forms of public welfare work for which the state is responsible;

(b) supervise all social services work, as the same may be administered by any local unit of government and the social services officials thereof within the state, advise them in the performance of their official duties and regulate the financial assistance granted by the state in connection with said work;

(c) distribute, reimburse and grant as herein provided the funds appropriated by the legislature for such participation and also such funds as may be received from the federal government for such purpose or purposes.

APPENDIX J

New York Social Services Law §34 (1) (2) (3a-f)

§ 34. General powers and duties of the commissioner.

1. The commissioner of social services shall be the chief administrative officer of the department.

2. All the administrative and executive powers and duties of the department shall be vested in the commissioner.

3. The commissioner shall

(a) continue to have, exercise, and perform the functions, powers and duties conferred by law upon the commissioner of social services;

(b) execute and issue the determinations, decisions, orders, notices, licenses and certificates of the department as may be required in the exercise and performance of the functions, powers and duties conferred upon or vested in the department;

(c) take cognizance of the interests of health and welfare of the inhabitants of the state who lack or are threatened with the deprivation of the necessaries of life and of all matters pertaining thereto;

(d) exercise general supervision over the work of all local welfare authorities;

(e) enforce this chapter and the regulations of the department within the state and in the local governmental units;

(f) establish regulations for administration of public assistance and care within the state both by the state itself and by the local governmental units, in accordance with law;

APPENDIX K

New York Social Services Law §65 (1-3)

§ 65. County commissioners of public welfare.

1. There shall be a county commissioner of public welfare in each county public welfare district who shall administer the public assistance and care for which the county public welfare district is responsible and shall have general supervision and care of persons in need in the territory over which he has jurisdiction.

2. The county commissioner shall be responsible for the administration of all the assistance and care for which the county is responsible.

3. The county commissioner shall act as the agent of the department in all matters relating to assistance and care administered or authorized by the town public welfare officers.